IN THE SUPREME COURT OF IOWA

303

JAMES KIMBALL, MERLIN C. LONG, THOMAS E. SEEHAN, SR., DAVID L. FRYER, AND JAMES R. FRYER,	)	Filed November 24, 1982
Appellants,	)	338 / 67502
vs.	)	
CRISPUS NIX, WARDEN,	)	
Appellee.	)	

Appeal from Lee District Court - John C. Miller, Judge.

Appeal from dismissal of petition for writ of habeas corpus. REVERSED AND REMANDED.

Frank L. Fowler of Johnson & George, Iowa City, for appellants.

Thomas J. Miller, Attorney General, Gordon E. Allen, Special Assistant Attorney General, and Bruce C. McDonald, Assistant Attorney General, for appellee.

Considered en banc.

PER CURIAM.

The issue on the merits in this habeas corpus proceeding is whether conditions in the penitentiary constitute unconstitutional cruel and unusual punishment. The proceeding, however, involves two preliminary issues. One is whether habeas corpus is a proper action for challenging such conditions. On that issue, *compare Wilwording v. Swenson*, 404 U.S. 249, 251, 92 S. Ct. 407, 409, 30 L. Ed. 2d 418, 421 (1971); *Miller v. United States*, 564 F.2d 103, 105 (1st Cir.), *cert. denied*, 435 U.S. 931, 98 S. Ct. 1504, 55 L. Ed. 2d 528 (1977); *McNair v. McCune*, 527 F.2d 874, 875 (4th Cir. 1975); *Williams v. Richardson*, 481 F.2d 358, 360 (8th Cir. 1973); *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944); *In re Riddle*, 57 Cal. 2d 848, 851-52, 372 P.2d 304, 305, 22 Cal. Rptr. 472, 473, *cert. denied*, 371 U.S. 914, 83 S. Ct. 261, 9 L. Ed. 2d 173 (1962); *Mahaffey v. State*, 87 Idaho 229, 231, 392 P.2d 279, 281 (1964); *McIntosh v. Haynes*, 545 S.W.2d 647, 652 (Mo. 1977); *Mueller v. Cupp*, 45 Or. App. 495, 498, 608 P.2d 1203, 1205 (1980); *Commonwealth ex rel. Bryant v. Hendrick*, 280 A.2d 110, 113 (Pa. 1971); *Ziegler v. Miliken*, 583 P.2d 1175, 1176 (Utah 1978); *Harrah v. Leverette*, 271 S.E.2d 322, 331 (W. Va. 1980); *State v. Wood*, 265 N.W.2d 638, 639 (Minn. 1978), *with Phillips v. State*, 41 Ala. App. 393, 394, 133 So. 2d 512, 513 (1961); *Foggy v. State ex rel. Eyman*, 107 Ariz. 532, 533-34, 490 P.2d 4, 5-6 (1971); *Saia v. Warden of Connecticut State Prison*, 25 Conn. Supp. 519, 520, 209 A.2d 520, 520 (1964); *Pruitt v. Parratt*, 197 Neb. 854, 856, 251 N.W.2d 179, 181 (1977). *See also Cook v. Hanberry*, 596 F.2d 658, 660

(5th Cir.), *cert. denied*, 442 U.S. 932, 99 S. Ct. 2866, 61 L. Ed. 2d 301 (1979); *Crawford v. Bell*, 599 F.2d 890, 892 (9th Cir. 1979); *Darsey v. United States*, 318 F. Supp. 1346, 1348 (W.D. Mo. 1970); *People v. Sundstrom*, 638 P.2d 831, 831 (Colo. App. 1981); *Ziegler v. Miliken*, 583 P.2d 1175, 1177 (Utah 1978) (Ellet, C.J., concurring). The other preliminary issue is whether, after a federal court has taken jurisdiction of the subject in a class action, Iowa courts will also entertain an action regarding the conditions. On that issue, *see* 28 U.S.C. § 2283 (1976); *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 665, 98 S. Ct. 2552, 2558, 57 L. Ed. 2d 504, 513 (1978); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817, 96 S. Ct. 1236, 1246, 47 L. Ed. 2d 483, 498 (1976); *Fay v. Noia*, 372 U.S. 391, 420, 83 S. Ct. 822, 838-39, 9 L. Ed. 2d 837, 857 (1963); *Darr v. Burford*, 339 U.S. 200, 204, 70 S. Ct. 587, 590, 94 L. Ed. 761, 767 (1950); *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 370, 21 L. Ed. 287, 290 (1873); *Goff v. Menke*, 672 F.2d 702, 704-05 (8th Cir. 1982); *Crawford v. Bell*, 599 F.2d 890, 893 (9th Cir. 1979); *State of Idaho ex rel. Moon v. State Board of Examiners*, 567 F.2d 858, 860 (9th Cir.), *cert. denied*, 439 U.S. 915, 98 S. Ct. 3144, 57 L. Ed. 2d 1160 (1978); *Weiner v. Shearson, Hammill & Co.*, 521 F.2d 817, 821-22 (9th Cir. 1975); *PPG Industries, Inc. v. Continental Oil Co.*, 478 F.2d 674, 680, 682 (5th Cir. 1973); *Troxler v. St. John The Baptist Parish Police Jury*, 469 F.2d 647, 649 (5th Cir. 1972); *Miller v. Carr*, 535 F. Supp. 682, 686 (W.D. Wash. 1982); *Hayward v. Clay*, 456 F. Supp. 1156, 1159 (D.S.C. 1977);

Miller Dress Factory, Inc. of Puerto Rico v. Douglas, 385 F. Supp. 874, 878 (D.P.R. 1974); *Brown v. Rose*, 378 F. Supp. 902, 903 (E.D. Tenn. 1973); *Coffey v. Braddy*, 372 F. Supp. 116, 121 (M.D. Fla. 1971); *Creasy v. McConnell*, 262 F. Supp. 697, 700 (W.D. Va. 1966); *In re Morgan*, 80 F. Supp. 810, 815 (N.D. Iowa 1948); *Monamotor Oil Co. v. Johnson*, 3 F. Supp. 189, 197 (S.D. Iowa); *aff'd*, 292 U.S. 86, 54 S. Ct. 575, 78 L. Ed. 1141 (1933); *Phoenix Assurance Company of Canada v. Runck*, 317 N.W.2d 402, 407 (N.D. 1982); *Reserve Mining Co. v. Minnesota Pollution Control Agency*, 267 N.W.2d 720, 725 (Minn. 1978); *State ex rel. Zellner v. Board of Education of Cincinnati*, 34 Ohio St. 2d 199, 201, 297 N.E.2d 528, 530 (1973); *Perrenoud v. Perrenoud*, 206 Kan. 559, 573, 480 P.2d 749, 760 (1971); 6A *Moore's Federal Practice* § 57.08[3], at 57-43 (2d ed. 1979).

The warden endeavored to raise the two preliminary issues by special appearance. Special appearance is used to attack a court's jurisdiction, Iowa R. Civ. P. 66, but the district court undoubtedly had personal jurisdiction of the warden and subject-matter jurisdiction of habeas corpus proceedings. The district court therefore treated the special appearance as a motion to dismiss. Assuming that was otherwise proper, a motion to dismiss is based upon infirmities appearing on the face of the pleading attacked but this motion (special appearance) was speaking in nature; it raised affirmative matters. *Contrast* Iowa R. Civ. P. 237 (permits affirmative showing in support of motion and resistance).

Since the district court did have jurisdiction, the warden's

attack by special appearance, as such, should have been overruled. Since the special appearance as a motion to dismiss was speaking, it should have been overruled.

We thus return the case to district court for further proceedings.

REVERSED AND REMANDED.